EXHIBIT 12

ABA Ten Principles of a Public Defense Delivery System

BlackLetter

1 The public defense function, including the selection, funding, and payment of defense counsel is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

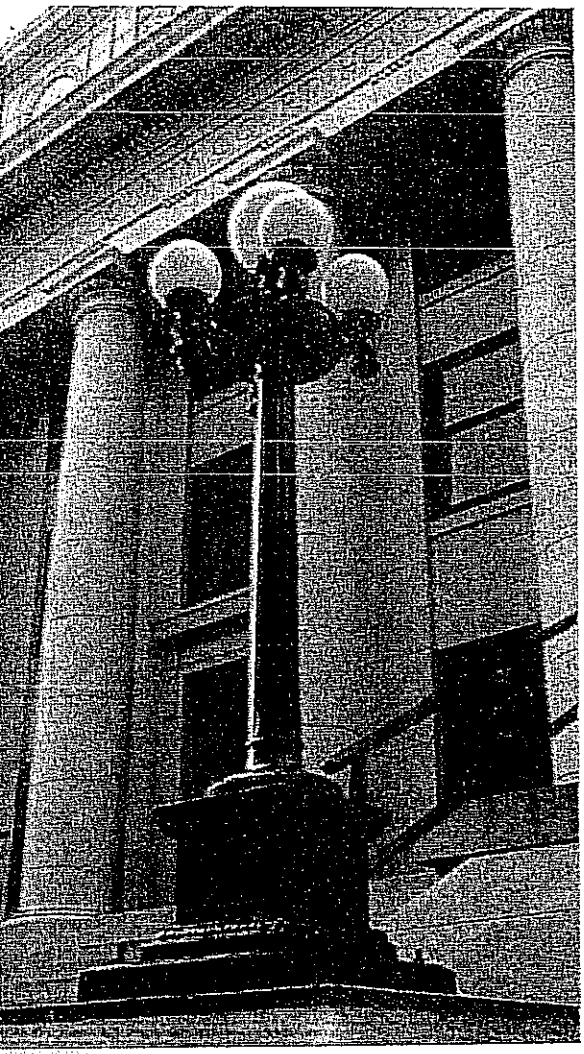
6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



Indigent Defense

BY MALIA BRINK

News Briefs

New York — Report Details Failures of Indigent Defense System and Proposes New Statewide Defender System

In 2004, Judith Kaye, Chief Judge of the New York Court of Appeals, announced the formation of a commission to examine indigent defense services in the State of New York. The Commission on the Future of Indigent Defense Services was charged with performing a top-to-bottom examination of the state's criminal indigent defense system and developing a blueprint for reform.

The commission released its final report on June 28, 2006. The report noted that indigent defense in New York is in crisis, citing overwhelming caseloads and dramatic under-funding as the primary causes. The result, according to the report, is that defendants rarely meet with their lawyers and cases are not properly investigated and defended. Moreover, many defendants on lesser cases are going entirely without representation.

To remedy the situation, the report calls for the formation of a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender, Regional and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense. In releasing the report, Chief Judge Kaye said that crisis in the way county governments and New York City are providing indigent defense services requires a state take over.

The commission's report was not news to many in the defense community. Ray Kelly, President of the NYSACDL, remarked, "The Report findings released today should not be news to anyone. The statewide justice system is in shambles and has been for a long time."

Defense advocates also, in large part, agreed with the report's recommendations, but many noted that implementation must occur quickly. Immediately after the report was released, the New York Civil Liberties Union urged lawmakers to take steps soon or face litigation. "The clock has run out," said Donna Liebermann, NYCLU's executive director. "The time for reform is now."

The implementation of the report's recommendations would require legislative action. Judge Kaye said that she is hopeful lawmakers will take steps to implement the recommendations in the coming year.

In researching this report, the commission held public hearings across the state. NACDL, NYSACDL, and the New York Criminal Bar Association provided information to the commission and sent representatives to testify at the public hearings.

Montana — New Public Defense System Is Operational

The new statewide public defender system in Montana began operations on July 1, 2006. The system is the first in the country designed to meet the ABA's Ten Principles of a Public Defense Delivery System.

The new system is governed by a commission appointed by the governor. The commission operates 11 regional defender offices around the state staffed with full-time public defenders. These defenders will handle the bulk of cases state-wide, although, in more sparsely populated areas, contracts with private attorneys will be used. Both the defenders and contract attorneys will be required to attend training sessions and meet uniform professional standards adopted by the commission.

The new Chief Public Defender, Randi Hood, told the Great Falls Tribune that she was excited about the opening of the new offices. "I've waited a long time for this day," Hood said.

The new system was established after the ACLU filed a lawsuit claiming the county-based system was not meeting constitutional requirements. A 2004 report by the National Legal Aid and Defenders Association found that the system was grossly under-funded, resulting in dramatically high caseloads, untrained attorneys, and inadequate time to meet with clients and properly plan cases.

If you have indigent defense news you would like reported in The Champion, *send an email to malia@nacdl.org.*

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The Nation.

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Keeping Gideon's Promise

EYAL PRESS

In 1987 a jury in Billings, Montana, convicted an 18-year-old man named Jimmy Ray Bromgard of raping an 8-year-old girl. At the trial the victim, who earlier had picked Bromgard out of a police lineup, said she was only "60-65 percent" sure he was the perpetrator. The next day in court, however, prosecutors introduced hair samples found at the scene of the crime that they said were indistinguishable from those provided by the accused. The director of the state's crime lab testified that the chances of this being a coincidence were one in 10,000. Bromgard's public attorney did not challenge this claim. He met with his client only once before the trial began, waived his opening statement and failed to investigate whether other evidence at the scene of the crime, such as traces of semen on the girl's dress, implicated his client. It took one hour for the jury to arrive at a guilty verdict; the judge, struck by Bromgard's lack of remorse, sentenced him to three concurrent forty-year sentences.

But there is a reason Bromgard wasn't sorry. As an investigation by the New York-based Innocence Project would eventually reveal, the semen found on the victim's dress did not match up with his. The scientific-sounding claims about the hair samples turned out to be baseless. In 2002 DNA testing cleared Bromgard of the crime, by which point he'd spent more than fifteen years in state prison--"hard years," stresses Ron Waterman, a lawyer now representing him in a civil suit. Like many presumed child molesters, Bromgard was beaten repeatedly while locked up. On one occasion his jaw was smashed. He left with a decade-plus gap in his employment history and no functional skills. "And, of course, there's still a stigma that follows him," Waterman told me when we met at his office in downtown Helena, the state capital.

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09/11/2006 issue

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Jimmy Ray Bromgard may have paid more dearly for the shoddy legal representation he received than most people who have shuffled through Montana's criminal justice system over the past few years, but his case was no anomaly. "Our estimate was that the system got roughly 100 people wrongfully imprisoned per year," said Waterman, a partner at one of Helena's most prestigious law firms. The problem was not just overzealous prosecutors, he explained. It was a public defender system that left poor people accused of crimes consistently shortchanged.

A few years ago investigators from the National Legal Aid and Defender Association (NLADA) fanned out across Montana to gauge the extent of problems like those Bromgard encountered. In some counties, they found, public defenders reported being so overloaded they spent forty-five minutes per felony. Others said judges pressured them to pursue plea bargains for their clients regardless of the circumstances, or that they had no money to purchase office supplies, much less to hire experts to contest the evidence prosecutors presented in court. In one instance a lawyer was unaware that his client was a schizophrenic; another characterized investigating the charges against the people he represented as "aspirational activities."

The NLADA investigation was carried out at the behest of the ACLU, which in 2002 had filed a lawsuit charging seven Montana counties with failing to fulfill their constitutional obligation to provide indigent residents with qualified legal counsel. Afterward lawyers on both sides set about preparing for a bruising legal battle. Depositions were taken; arguments were prepared. The matter seemed destined to be settled in court. In May 2004, however, perhaps sensing that a ruling might not go in the state's favor, Montana Attorney General Mike McGrath announced that instead of fighting the lawsuit, he would work with the ACLU to convince the legislature to pass a bill addressing its concerns.

It was a novel concept, one that, in a fiercely libertarian state where suspicion of government runs deep, many people doubted could succeed, which is one of the reasons the ACLU agreed to suspend its lawsuit for one year to see how things played out, not withdraw it altogether. In June 2005 Montana became the first state to enact legislation modeled on the American Bar Association's "Ten Principles of a Public Defense Delivery System," creating a new Office of the State Public Defender that, among other things, would provide indigent defendants with lawyers as soon as possible, keep attorney caseloads reasonable and rigorously supervise performance to insure that the constitutional rights of anyone accused of a crime in Montana are upheld. To the surprise of everyone, the bill passed with overwhelming support from Democrats and Republicans alike.

What makes the turnaround in Montana all the more noteworthy is that nationally, improving legal representation for indigent defendants has not exactly been a front-burner issue. Although Congress passed legislation addressing the lack of competent attorneys for poor people accused of capital crimes, the funds were never appropriated. The picture at the state level has not been much rosier. Three years ago, on the fortieth anniversary of Gideon v. Wainwright, the landmark Supreme Court decision establishing that states have

a constitutional obligation to provide indigent defendants with counsel in felony cases--a right that subsequent rulings have extended to various other types of crime--the American Bar Association held a series of public hearings to examine whether its promise was being fulfilled. Its conclusion was grim. "Thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the, inclination to provide effective representation," the ABA report stated. "The fundamental right to a lawyer that Americans assume applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States."

David Carroll, director of research at the NLADA, says the crux of the problem is that since the Gideon decision so many states have left the task of implementation to counties, with predictably perverse results. "When you have counties funding the system, the ones that have higher crime, more poor people and the greatest needs tend to have the least tax base," he explained. "In a state like California, counties that have money--LA, Santa Clara--have really great systems and try to follow national standards. At the same time, the ones without tax revenue hire a single attorney for a flat fee. They have enormous caseloads with no supervision or training, and contracts that don't cover costs. The level of justice defendants receive depends on which side of the county line they live on."

Montana, before passage of the recent legislation, was a case in point. At the time the ACLU filed its lawsuit, only one of the seven counties it was suing even had a formal public defender office. There were no uniform training standards for lawyers representing poor people in different parts of the state, no rules limiting the caseloads they handled and no system to monitor performance, so that even the most basic functions, such as insuring that attorneys met with their clients, often were ignored.

While in Montana I drove one day to Missoula, a small city nestled in an old glacial lakebed in the western part of the state, to meet with Candace Bergman, one of the plaintiffs in the ACLU's suit. Bergman has curly brown hair, bright eyes and an attractive smile that disappeared when the subject turned to her experience with the criminal justice system. A few years ago she got arrested on a drug possession charge. A meth addict who knew she needed help but had never committed a violent crime and had two children to support, Bergman hoped that, with some guidance from the lawyer assigned to her case, she could get into treatment and turn her life around. For weeks, however, she sat in county jail without hearing from him. She wrote letters but received no reply. Bergman tried phoning, only to discover that collect calls from the detention facility weren't accepted. As the weeks passed, her frustration mounted. One day, she opened the newspaper and spotted a notice in the classifieds indicating that her trailer home had been auctioned off without her consent.

"I felt discarded, abandoned, ashamed," she told me. When she finally met with the lawyer, he told her he was leaving the Public Defender Office and that another attorney would take over her case. Nearly two months passed before she saw that lawyer. When

she went before a judge, she was handed a six-month sentence, four months fewer than she'd already served.

Locally as well as nationally, stories like Bergman's have generally failed to move politicians, not least because the people being shortchanged are poor and, disproportionately, members of minority groups (in Montana Native-Americans are 7 percent of the population but 17 percent of those in the state corrections system). Yet beginning in 2003, the Law and Justice Interim Committee, a twelve-member legislative body divided evenly between Democrats and Republicans, started hearing months of testimony about how the system worked: private attorneys who pulled out all the stops to keep clients out of jail while overburdened public defenders encouraged theirs to cop pleas; counties where judges hand-picked public defenders they knew wouldn't put up much of a fight for the people they represented. The testimony evidently swayed members of both parties, for the effort to overhaul the system was "astoundingly bipartisan," says Vincent Warren, a senior staff attorney with the ACLU who spearheaded the litigation effort. Indeed, the bill approved by the legislature last year was co-sponsored by Democrat Mike Wheat, a state senator from Bozeman, and Dan McGee, a Republican from Laurel known as one of the most conservative members of the legislature--a fervent opponent of abortion and an antitax crusader who came into office as "a hang-em-high anticrime guy," according to Scott Crichton, head of the Montana ACLU.

As McGee tells it, he and other Republicans supported reform because they were convinced by arguments that the old system was fundamentally unfair. "One of the hallmark principles of American jurisprudence is you are innocent until proven guilty," McGee told me in an interview, a principle he said should apply to everyone, not just the rich. But McGee went on to strike a more pragmatic note as well: By creating uniform performance standards and a state office to oversee counties, he suggested, Montana could reduce the glut of appeals and wrongful convictions, insure that people being paid to work as public defenders actually do their jobs, and improve efficiency. It is not an argument widely in dispute. "There was absolutely no accountability in the old system," Pam Bucy, who works in the Attorney General's office, told me. "We didn't say the new system was going to be cheap. We said, You don't even know what you're paying now. What you need is accountability. I think that moved county officials, and it certainly moved the legislature."

It didn't hurt, of course, that lawmakers understood that failure to act might mean being forced to do so by a judge, as happened in November 2004, when the Montana Supreme Court affirmed a lower-court ruling declaring the state's system of funding public education unconstitutional. "I told legislators, If you don't fix this and we go to court and we win, you'll have a train wreck that will make school funding look like a picnic in the park," Ron Waterman told me. "The day a judge declares the system unconstitutional, every prosecution that goes forward thereafter is under question. And everyone who is incarcerated can say, The system that convicted me is unconstitutional. You could have a rehearing on 2,000-plus cases."

In places where the movement for reform is making headway, it's likewise been for a combination of principled and pragmatic reasons. "Any time an innocent person is convicted of a crime that was committed, the perpetrator was not," noted Rhoda Billings, the former Chief Justice of North Carolina, in an interview. Billings, a Republican, is among the co-chairs of the National Committee on the Right to Counsel, a bipartisan group of judges and public officials headed by former Vice President Walter Mondale. It is preparing a report on the consequences of failing to fulfill the obligation spelled out in Gideon. Like many people with firsthand experience in the courts, Billings has seen how abdicating responsibility can overwhelm the correctional system. "If criminal prosecution is not done effectively and efficiently, the cost runs up," she explained.

There are, of course, risks to framing provision of legal services for the poor as a good way to prevent wasteful spending--creating an equitable system may, after all, cost money. In early February, at a Chicago summit on indigent defense hosted by the ABA, Michael Mears, director of the Georgia Public Defender Standards Council, told me that to get fiscally conservative Republicans behind the effort to overhaul the system there, advocates stressed "efficiency and effectiveness." But, he acknowledged, "the downside of dealing with fiscally conservative people is that they really mean it." If insuring that every poor person is represented by a competent attorney ends up being expensive, reformers may end up regretting the promises they made.

It's a scenario some fear will crop up in Montana, which will have its new system up and running in June, at which point politicians will be watching closely to see what the price tag is. In a state with a limited tax base that ranks forty-ninth in wages, the hope many people have invested in the new law may come crashing up against the hard rock of fiscal reality. "What we have now is a wonderful piece of legislation," said Waterman. "But the day will come when we go back to the legislature and say, Here's what it will cost to fund it." At that point, he said, "there's going to be some struggle." Attorney General McGrath insisted to me that such concerns are overblown, since running a more accountable system will end up saving taxpayers money.

For now, anyway, it can at least be said that Montana has made a genuine commitment to change, which is a lot more than can be said of many other states. It has hired a Chief Public Defender, Randi Hood, who in 2004 was named Public Defender of the Year and who told me she intends to fire attorneys who fail to measure up. The state has created an eleven-member Public Defender Commission, staffed by attorneys with years of experience and headed by James Park Taylor, a former public defender and tribal attorney. Both Taylor and Hood acknowledge that implementing change will take time, but both also believe Montana may well serve as a model for other states looking to enact reforms in the years to come.

It is a point I heard echoed by Karla Gray, Chief Justice of the Montana Supreme Court. Gray was attending the ABA's Chicago summit to talk about the legislation Montana had passed, which she described to me as "visionary." When I mentioned that I was from New

York, she told me that the Chief Judge there, Judith Kaye, was a friend of hers--a friend who's eager to see the Empire State follow in Montana's footsteps, it appears. A few months ago a commission examining New York's indigent defense system shared its interim findings with Judge Kaye. In her 2006 State of the Judiciary Address, she declared, "I have not seen the word 'crisis' so often, or so uniformly, echoed by all of the sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color." As the statement indicates, the assumption that indigent defendants are denied their rights only in the Deep South and in poorer states is wrong. The good news is that changing this is not impossible. As one person told me in Helena, if it can happen in Montana, it can happen anywhere.

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